

Quello also expressly recognized the "paternalistic bias"^{45/} which animates home shopping's critics.^{46/}

But those critics have never explained why such programming is less desirable than quiz shows which offer merchandise for prizes, soap operas, talk shows which emphasize sexual topics or violent or sexually-explicit dramatic programs. They never suggest a constitutional basis for a Commission decision that it is permissible for viewers to be entertained by "Gilligan's Island" or "NYPD Blue" but not by home shopping programming.^{47/} And they cannot point to any societal harm which might support the

^{45/} The Harris Survey demonstrates that such paternalism (if intended to protect consumers against the impulse to purchase) is unnecessary. It notes that few home shopping viewers purchase products with any frequency -- only ten percent of those surveyed (which was limited to home shopping viewers) made a purchase the last time they watched a home shopping program, and only 19% purchased a product within the preceding month.

^{46/} Must Carry Report, Separate Statement of Chairman Quello ["People probably are not thinking about what has been called the 'electronic superhighway' when they joke about Ginsu knives and cubic zirconium jewelry. And while the products being sold at the moment on some channels may attract ridicule in some quarters, it is evident that home shopping services are a precursor to this promising future in which consumers may use their TVs for more than just passive viewing."]

^{47/} Home shopping is entertaining. As one study describes the service: "...consumers see unusual merchandise, can talk to a friendly host, be entertained by a celebrity guest, learn about the merchandise in a non-threatening environment, order from the comfort of their armchair -- and save money. It's fun." WSL Report at 18.

governmental interest necessary to legitimate content-based regulation.

By contrast, children's television commercial limits are premised upon a specific Congressional mandate^{48/} and supported by substantial evidence of the need for restrictions.^{49/} Notwithstanding the societal harm attributed to violent and sexually-explicit television programming,^{50/} Congress and the Commission have thus far eschewed limitations thereon because of constitutional concerns. Similarly, despite Congress' mandate, the

48/ Children's Television Act of 1990, Pub. L. No. 101-437, 101st Cong., 1st Sess. (codified at 47 U.S.C. § 303b[a][2]); see Children's Television Programming, 6 FCC Rcd 2111 (1991), recons., 6 FCC Rcd 5093 (1991). There is no similar Congressional mandate with respect to commercial limitations. Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1438 (D.C. Cir. 1983).

49/ See, e.g., "Children's Television," Hearing before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce (April 6, 1989) Serial No. 101-32; "Education, Competitiveness and Children's Television," Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (April 12, 1989) S. Hrg. 101-69; "Commercial Time on Children's Cable TV," Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (October 18, 1989) S. Hrg. 101-426.

50/ See, e.g., Notice of Proposed Rulemaking, GC Docket No. 92-223, 7 FCC Rcd 6464, 6468 (1992) [Separate Statement of Commissioner Duggan]; Chairman James H. Quello, Speech before the NATPE/INTV Convention (Jan. 24, 1993); "Stamping Out TV Violence: A Losing Fight," The Wall Street Journal (Oct. 26, 1993) at B1; "Violence on Television," Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary (December 15, 1992) Serial No. 115.

Commission has not been able to craft constitutionally-acceptable restrictions on indecent programming.^{51/}

If the constitution does not permit content-based restrictions on violent or indecent programming, where there is at least a colorable claim of societal harm, it clearly forbids such limitations on home shopping programming, where there is absolutely no basis for a similar claim. Home shopping programming is not violent. It is not sexually explicit. Rather, it is a unique mix of entertainment and information. That it is distinctly different from conventional commercial television programming^{52/} does not mean that it should be subject to exceptional regulation.

Neither Congress, the Commission nor home shopping's vocal critics have ever articulated any specific harm associated with the broadcast advertisement and sale of legitimate goods and services. In fact, they have made no showing whatever of any social damage flowing from broadcast of advertising material or of home shopping programming. One looks in vain for any scholarly or empirical demonstration that commercial matter is so detrimental to

51/ See Action for Children's Television v. FCC, No. 93-1092 (D.C. Cir. Nov. 23, 1993).

52/ See, e.g., "In Dirty Laundryland," The New York Times, October 10, 1993, Sec. 9, p.1, for a description of the content of standard daytime television programming.

society that it requires or would legally support extraordinary restrictive federal regulation.^{53/}

Home shopping's critics have never demonstrated anything other than their own private preference for different categories of "better" programming to support their arguments that home shopping programming is somehow less desirable and therefore subject to more regulation than other types of broadcast programming. The Commission, however, has frequently reiterated that it cannot base regulatory decisions on determinations as to what is a "good" or a "bad" program^{54/} -- yet that is precisely what commercial reregulation would represent. Reregulation on the theory that government must discourage content related to salability because it is somehow less desirable than

53/ Indeed, the Commission has recognized that broadcast of commercial matter serves an important societal interest by informing the public concerning goods and services available for sale. Commercial Advertising Standards, supra; see Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 765 (1976) ["So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be decided through numerous private decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable."]

54/ See, e.g., Commission en banc Programming Inquiry, 44 FCC at 2308 [the Commission "may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program."]; Radio Akron, Inc., 62 FCC 2d 987, 995 (1977); Television Wisconsin, Inc., 58 FCC 2d 1232, 1235-1236 (1975); KSD/KSD-TV, Inc., 61 FCC 2d 504, 511 (1976).

other types of entertainment programming^{55/} would be precisely the type of prohibited content-based program regulation which the Commission has heretofore avoided.

Congress and the Commission have been reluctant to regulate broadcast speech even when there is a showing of harm (e.g., children's programming, violence, obscenity.) That reluctance must become complete forbearance in the absence of any such showing: there is no governmental interest in restricting broadcast home shopping.

Home Shopping Programming Serves an
Affirmative Public Interest Purpose

The need for a compelling governmental interest to support restrictions on home shopping formats is magnified by the fact that such programming's availability provides substantial public interest benefits. Based upon voluminous submissions in MM Docket No. 93-8, the Commission found that home shopping enables persons who may not be able or want to leave their homes to shop to do so, concluding "...that home shopping stations provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional

^{55/} Perhaps the concern is that home shopping encourages materialism, which is not a socially desirable result. Such a concern cannot be constitutionally justified. Moreover, it is misplaced: studies suggest that home shoppers are less rather than more materialistic than non-shoppers. WSL Report at 18.

manner."^{56/} Even home shopping's most vociferous critics have not challenged this determination.

Nor have they taken issue with the fact that the availability of a home shopping format has made the most tangible contribution to date to minority television station ownership. The record in MM Docket No. 93-8 includes substantial, undisputed evidence of home shopping's unmatched contribution to enhancing minority television station ownership.^{57/} HSN in particular has funded the acquisition or construction of a seven minority-owned television stations, including Television Stations WBSF, Melbourne, Florida; KBSP, Salem, Oregon; WBSX, Ann Arbor, Michigan; WHSL, East St. Louis, Illinois; and WJYS-TV, Hammond, Indiana. It has also furthered the development of numerous others through its affiliation agreements. At present, HSN is affiliated with 36.7% of all minority-owned television stations in the country.^{58/} As the Commission

^{56/} Must Carry Report, 8 FCC Rcd at 5327 and Statement of Chairman Quello.

^{57/} Id. at 5327-5328.

^{58/} According to NTIA, there are 19 Black-owned television stations in the United States, seven owned by Hispanics and one owned by Asians. National Telecommunications and Information Administration, "Analysis and Compilation by State of Minority-Owned Commercial Broadcast Stations" (October 1993). Also, Stations WJJA(TV), Racine, Wisconsin and WTMW(TV), Arlington, Virginia, which are Black-owned, and KCRA(TV), Riverside, California, which is Asian-owned, also are affiliated with HSN but were not included in NTIA's
(continued...)

has recognized, these "minority controlled licensees of home shopping stations enhance the diversity of views and information available to the public."^{59/}

Action in this proceeding which restricts the continued availability of a home shopping format would have a devastating adverse economic impact on minority station ownership, a result at odds with paramount national policy.^{60/} Minority-owned stations would be faced with the choice of ceasing operations or of airing less attractive programming which other more established stations have rejected, reducing station revenues to a level where operations might not remain viable. Either result would disserve the public interest.^{61/}

58/ (...continued)
most recent analysis of minority ownership. Thus, eight of the Black-owned stations, one of the Hispanic-owned stations are two of the Asian-owned stations are affiliated with HSN.

59/ Id. at 5328.

60/ See, e.g., Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982); Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub. L. 100-202 (December 22, 1987); 47 U.S.D. § 309(i)(3)(A) (1988); see also Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990).

61/ Members of Congress have explicitly concurred in this conclusion. See, e.g., Letter from Congressman Ed Towns to Congressman Carlos Moorhead (April 6, 1992); Letter from Parren J. Mitchell to Congressman John D. Dingell (July 17, 1992).

Finally, home shopping has facilitated the implementation of interactive video services. Prior to HSN's introduction of the home shopping format, broadcast television had been a one-way medium, with viewers passively watching what appeared on the screen. Home shopping invited them to interact with their television sets. Ten years from now, today's interaction may well seem extraordinarily primitive. But if that occurs, it will be because home shopping paved the way for full interactivity. As then-Chairman Quello recognized:

[Consideration of home shopping services] implicates a broader public interest question that goes to the heart of the future of broadcasting. We are constantly told of the brave new electronic future in which an array of services will be available on call directly to consumers. They include home shopping, home banking, pay-per-view events and a host of other interactive services...[I]t is evident that home shopping services are a precursor to this promising future in which consumers may use their TVs for more than just passive viewing.^{62/}

Given the affirmative public interest benefits associated with home shopping programming, the constitutional need for a demonstration of clear offsetting harm is even greater than the already demanding "compelling governmental interest" standard. As no such harm has been established, there can be no constitutional restriction of home shopping programming.

62/ Notice, Separate Statement of Chairman Quello at 3.

There is No Constitutionally Permissible
Less Restrictive Regulation of Home Shopping Programming

At paragraph 7 of its Notice, the Commission asks how it might define an "excess" of commercial programming which must be subject to regulation.^{63/} To ask the question is to emphasize the constitutional infirmities of any such restrictions. Has the Commission ever sought to define an "excess" of entertainment programming? On what constitutional basis can it single out commercial programming for such definitional distinction?

There is none. There is no constitutionally permissible basis for the Commission to conclude that it is consistent with the public interest to air home shopping programming for twelve, for example, but not for thirteen hours per day. The Commission has repeatedly refused to establish quantitative guidelines for the presentation of public service programming, based principally upon First Amendment objections to such rules.^{64/} So long as stations continue to comply with their public service programming obligations -- and the Commission has concluded that

63/ The Notice also asks for comments on the mechanics associated with possible reimposition of commercial restrictions. Because HSN believes that any such action would be so clearly constitutionally impermissible, these comments do not address that aspect of the inquiry.

64/ See, e.g., National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978); Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413.

stations with a home shopping format do so -- there can be no basis to limit broadcast of other programming types.

Conclusion

Commission action to limit television stations' broadcast of commercial matter in general or adoption of a home shopping format in particular would be content-based regulation clearly prohibited by the First Amendment. The Commission has never described specific harms associated with the presentation of commercial matter, nor have home shopping's critics demonstrated why such programming requires governmental restrictions. There is simply no governmental interest in suppressing home shopping programming.

Television Deregulation's elimination of commercial guidelines fulfilled the Commission's expectations. It prompted innovation and led to institution of a new home shopping format, a pioneering application of interactive video which has proven immensely popular with the public and which provides acknowledged public service benefits. The availability of that format has produced the added, critically important benefit of enhancing minority television station ownership. The consequent clear public interest in the continued unrestricted availability of the home shopping format precludes any contemplated return to pre-deregulation restrictions.

The vocal and unrelenting nature of home shopping critics should not be allowed to obscure the complete lack of substance to their criticism. Subjective beliefs that there is something inherently "bad" about commercial matter, or that non-commercial entertainment, even if violent or sexually explicit, is more desirable than commercial matter, do not afford an appropriate or constitutional basis for Commission regulation. Commercial speech is entitled to constitutional protection, and home shopping's critics have never demonstrated a specific compelling governmental interest in its suppression.

Home shopping programming should be accorded the same regulatory treatment as other types of entertainment programming. It should not be restrictively reregulated. Home Shopping Network, Inc., therefore, respectfully requests that the Commission terminate this inquiry without further rulemaking proceedings.

Respectfully submitted,

HOME SHOPPING NETWORK, INC.

By Celia Bachman
Celia Bachman, Esq. *SNP*

Celia Bachman, Esq.
General Counsel
HOME SHOPPING NETWORK, INC.
2505 - 118th Avenue, North
St. Petersburg, FL 33716
(813) 572-8585

December 20, 1993

Exhibit No. 1

A SURVEY OF VIEWERS OF TV SHOPPING PROGRAMS

Study No. 933007

**A SURVEY OF VIEWERS OF
TV SHOPPING PROGRAMS**

CONDUCTED FOR:

Home Shopping Newwork

FIELDWORK:

December 10 to December 14, 1993

PROJECT DIRECTORS:

Humphrey Taylor, President & CEO
Joy Sever, Research Director
Rodney Washington, Research Director

LOUIS HARRIS AND ASSOCIATES, INC.

630 Fifth Avenue
New York, NY 10111
(212) 698-9600

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INTRODUCTION

This report presents the results of a survey of 1006 adults who watch TV shopping programs once a week or more often, conducted for Home Shopping Network. Fieldwork was conducted between December 10 and December 13, 1993. The sample was designed to be a representative cross-section of people who say they watch TV shopping programs once a week or more often, in the contiguous 48 states.

The purpose of this survey was to determine why viewers of TV shopping programs watch these programs and specifically if they watch because they expect to buy something or because they are entertained by them and find them interesting. In order to find and interview the 1006 viewers a total of 5,250 screening interviews were completed. A total of 19% of this nationwide cross-section of adults qualified as viewers for the full interview.

A detailed survey methodology and a copy of the questionnaire are included as an appendix to this report. In addition to this report Home Shopping Network will also receive a full set of tabulations and a questionnaire annotated with the survey results.

A Note On Reading The Tables

An asterisk (*) on a table signifies a value of less than one-half percent (0.5%). A dash (-) represents a value of zero. Percentages may not always add up to 100% because of computer rounding, multiple answers from, or the elimination of "no answers."

Public Release Of Survey Findings

All Louis Harris and Associates surveys are designed to adhere to the code of standards of the Council of American Survey Research Organizations (CASRO) and the code of the National Council of Public Polls (NCPP). Because data from the survey will be released to the public, any release must stipulate that the complete report is available.

Project Responsibility

The directors of this project at Harris/Scholastic Research, a division of Louis Harris and Associates, Inc., were Humphrey Taylor, CEO and President, David Krane, Executive Vice President of Operations, David Ogilvie, Senior Vice President, Joy Sever, Research Director, and Rodney Washington, Research Director. Responsibility for questions, findings, and their interpretation rests solely with Louis Harris and Associates, Inc.

THE MAIN FINDINGS

Why People Watch TV Shopping Programs

More than half (53%) of TV shopping viewers in this survey indicated that they watch TV shopping programs mainly for entertainment and interest. This includes 21% who watch only for entertainment and interest and 32% who watch mainly for entertainment and interest. In contrast, only 14% of viewers in this survey indicated that they only (5%) or mainly (9%) watch to buy something.

Almost a third (30%) of viewers claimed to have more than one reason for watching TV shopping programs. Viewers indicated that they watch equally "to buy something" and "for entertainment and interest" (Table 1).

Viewers also rated the importance of various reasons for watching TV shopping programs. Topping the list was "information regarding products" which was endorsed as a very important reason by 54% of viewers and a somewhat important reason by 31% of viewers. The "entertainment value" is an important reason for watching TV shopping programs for nearly two-thirds (65%) of TV shopping viewers, including 20% who feel it is a very important reason and 45% who said it was a somewhat important reason.

"Hearing live testimonials from other viewers" (55%), "watching celebrities, sports figures, film stars and TV personalities" (48%), and "watching a certain host or hostess" (43%) appear to be relatively less important reasons for watching TV shopping programs (Table 2).

Q.B1

TABLE 1

WHY DO TV SHOPPING VIEWERS WATCH TV SHOPPING PROGRAMS

Q.: Do you usually watch TV shopping programs only to buy something, mainly expecting to buy something, mainly for entertainment and interest, only for entertainment and interest, or equally to buy something and for entertainment and interest?

	<u>TOTAL</u>
Base:	1006
	%
Only to buy something	5
Mainly expecting to buy something	9
Mainly for entertainment and interest	32
Only for entertainment and interest	21
Equally to buy something and for entertainment and interest	30
Not sure/refused	4

Q.B6

TABLE 2

IMPORTANCE OF VARIOUS REASONS FOR WATCHING
TV SHOPPING PROGRAMS

Q: How important to you are the following reasons for watching TV shopping programs?
Is (READ EACH ITEM) -- very important, somewhat important, not very important,
or not all important?

	<u>Very Important</u> %	<u>Somewhat Important</u> %	<u>Not Very Important</u> %	<u>Not At All Important</u> %
Information regarding products	54	31	8	6
Hearing live testimonials from other viewers	21	34	20	24
Entertainment value	20	45	19	15
Watching a certain host or hostess	17	26	23	32
Watching celebrities, sports figures, film stars and TV personalities	17	31	23	29

Frequency of Purchasing Products From TV Shopping Programs

Most TV shopping program viewers do not purchase products with any frequency. Ten percent of viewers, however, did purchase something the last time they watched a TV shopping program, and 19% purchased something in the last month. These numbers represent a small segment of the total TV shopping viewing audience and are consistent with viewers' claim that they watch TV shopping programs for entertainment and interest.

Comparing those viewers who claim to watch to buy with those who claim to watch for entertainment and interest is also consistent with this picture. One quarter (24%) of those who watch to buy did purchase something the last time they watched a TV shopping program and 31% purchased something in the last month. This greatly exceeds the purchase behavior of those who watch for entertainment and interest -- 4% purchased the last time they watched and 8% purchased in the last month (Table 3).

Q. B3/Q. B4

TABLE 3

TV SHOPPING PROGRAM VIEWERS' PURCHASE BEHAVIOR

Q.: The last time you watched a TV shopping program did you buy anything or not ?

Q.: Over the LAST MONTH have you bought anything while watching a TV shopping program or not? Do not include items advertised during commercials on regular TV programs.

	<u>Total</u>	<u>Watch to Buy</u>	<u>Watch for Entertainment/ Interest</u>
Base:	1006	130	533
	%	%	%
Purchased last time watched program	10	24	4
Purchased in last month	19	31	8

Frequency of Watching TV Shopping Programs

Viewers are not homogeneous in their viewing habits. Recall that to qualify as a "TV shopping program viewer" in this study, viewers must have indicated that they watch TV shopping programs at least once a week. For 46% of these qualified viewers, one day per week is all they watch in a typical week. At the other end of the spectrum, however, are viewers who watch TV shopping programs 7 days per week -- a group consisting of 12% of the total sample. Overall, TV shopping viewers reported watching TV shopping programs an average of two days in a typical week.

In addition to asking about a "typical week," viewers were also asked about the number of days they watched TV shopping programs in the last month. Nearly one third (29%) are watching the programs 10 or more days per month with the median number of days per month being five (Table 4).

Q. A2/Q. A3

TABLE 4

FREQUENCY OF WATCHING TV SHOPPING PROGRAMS

Q.: How many days in a typical week do you usually watch TV shopping programs?
Q.: During the last month, on how many days did you watch a TV shopping program?

	<u>Total</u>
Base:	1006
	%
Per Week	
1 day	46
2-6 days	43
7 days	12
Per Month	
1 time	9
2-3 times	25
4-9 times	31
10 or more	29
Median number of days per week	2
Median number of days per month	5

But, Are People Who Watch More -- More Likely To Buy?

People who watch more purchase more. Frequent viewers of TV shopping programs (defined as those who watched 9+ days last month) are twice as likely as infrequent viewers (those who watched 8 days or less last month) to have purchased something the last time they watched a TV shopping program (15% v. 8%). They are also three times as likely as infrequent viewers to have purchased something in the past month (37% v. 12%). It is interesting to note, however, that even frequent viewers are not frequent purchasers as shown by these results (Table 5).

Q. B3/Q. B4

TABLE 5

PURCHASE BEHAVIOR OF FREQUENT AND INFREQUENT VIEWERS

Q.: The last time you watched a TV shopping program, did you buy anything or not?

Q.: Over the last month, have you bought anything while watching a TV shopping program or not? Do not include items advertised during commercials on regular TV programs.

	<u>Frequent Viewers</u>	<u>Infrequent Viewers</u>
Base:	303	682
	%	%
Purchased last time watched	15	8
Purchased last month	37	12

Time Of Day TV Shopping Programs Are Watched

The favored time of day to watch shopping programs is "in the evening" with 70% of viewers indicating that they watch during this time. "Late at night and "during the day" seem equally popular with 54% and 53% of viewers, respectively, indicating that they watch during these times.

"The evening" is also the time of day that viewers are most likely to watch TV shopping programs with 38% of the viewers in this survey endorsing this time over "late at night" (34%) and "during the daytime" (27%) (Table 6).

Q. B7a/Q. B7b

TABLE 6

TIME OF DAY TV SHOPPING PROGRAMS ARE WATCHED

Q.: Do you ever watch TV shopping programs (READ EACH ITEM), or not?

Q.: When are you most likely to watch TV shopping programs?

	<u>Total</u>
Base:	1006
	%
Ever Watch:	
In the evening	70
Late at night	54
During the daytime	53
Most Likely To Watch:	
In the evening	38
Late at night	34
During the daytime	27

Impressions of TV Shopping Programs

More than a third (35%) of viewers said that they find TV shopping programs very informative; 29% find them very interesting; and 28% find them very useful. Relatively fewer viewers find the programs very entertaining (23%) or very amusing (17%).

Comparing frequent viewers of TV shopping programs (those who watched 9+ days last month) and infrequent viewers (watched 8 or less days last month) reveals an interesting and consistent pattern. Frequent viewers are more likely to find TV shopping programs more informative, interesting, useful, entertaining, and amusing. A similar pattern is also apparent when viewers who watch to buy are compared to viewers who watch for entertainment and interest (Table 7).

Q. B2

TABLE 7

COMPARING IMPRESSIONS OF TV SHOPPING PROGRAMS

Q.: How (READ EACH ITEM) do you find TV shopping -- very, somewhat, not very or not at all? (Rated very...)

	<u>Total</u>	<u>Frequent Viewers</u>	<u>Infrequent Viewers</u>	<u>Watch To Buy</u>	<u>Watch for Entertainment/ Interest</u>
Base:	1006	303	682	130	533
	%	%	%	%	%
Informative	35	47	31	44	29
Interesting	29	41	24	40	21
Useful	28	39	24	36	21
Entertaining	23	32	19	28	19
Amusing	17	22	15	23	15